1967, section 30(1)(b) and the definition of "amend" in section 3.

Section 30(1)(b) reads:

"The repeal of a written law in whole or in part shall not... affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law;"

and section 3 defines "amend" as including "repeal...".

Mr. Rajan also argued that section 29 of the Interpretation and General Clauses Malayan Union Ordinance No. 7 of 1948, which by virtue of Article 160(1), applies to the interpretation of the constitution, draws a distinction between on the one hand a "person" and on the other an "authority" with power to appoint or dismiss, whereas the new proviso to Article 135(1) only refers to dismissal "by an authority", not to dismissal by "a person", and as the C.P.O. is a person, not an authority, the amendment does not apply to him and therefore his dismissal of the plaintiff was wrongful.

With respect we do not think that there is merit in Mr. Rajan's argument.

The C.P.O. was by exhibit D1B given power to dismiss a constable such as the plaintiff by the Commission. This delegation was in proper form. True at the time when the C.P.O. dismissed the plaintiff and at the time when the plaintiff's claim was tried the C.P.O. could not have dismissed the plaintiff because of Article 135(1). But section 30(1)(b) of the 1967 Interpretation Act does not apply where there is express provision to the contrary (see its section 2(3)), and the new proviso to Article 135(1) does contain an express provision to the contrary (it is expressed to take effect from Merdeka Day); clearly since that day the C.P.O. may lawfully dismiss a constable such as the plaintiff, and therefore the plaintiff's dismissal was not unlawful.

In *Loh Kooi Choon* v. *The Government of Malaysia,*[3] this court has held that an amendment to Article 5(4) of the Constitution can be made with retrospective effect. In our view the same applies to amendments to Article 135(1).

Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, section 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the authority of *Quilter* v. *Mapleson,*[4] that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

That case was approved by the House of Lords in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board*[5] where Lord Gorell said at pages 801 and 802:

"Under the Judicature Acts and Rules the hearing of an appeal from the judgment of a judge is by way of rehearing, and the court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the court may think fit (see Order LVIII rules 1 and 4).

The court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see Order LVIII rule 4).

It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing, and if any authority were required for this proposition it is to be found in the case of *Quilter* v. *Mapleson.* In that case an action of ejectment had been brought under a proviso of re-entry for breach of a covenant in a lease, and Lord Coleridge C.J. gave judgment for the plaintiff. The defendant appealed and obtained a stay, so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the Conveyancing and Law of Property Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal, consisting of Jessel M.R. and Lindley and Bowen L.JJ. reversed the decision, and granted the relief sought for by the defendant, holding that on a rehearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance.

In my opinion the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard."

As regards Mr. Rajan's argument based on section 29 of the Interpretation and General Clauses Ordinance No. 7 of 1948, in our view the C.P.O., Selangor, is both a person and an authority and therefore his dismissal of the plaintiff is validated by the new proviso to Article 135(1).

We would therefore allow this appeal.

As regards costs, the plaintiff won in the High Court and was awarded costs. We do not think it right to disturb that order, since the law then was on his side. As regards costs of this appeal, we agree with Mr. Rajan that the plaintiff should get them also. The Government have used their power to deprive the plaintiff of a right that was vested in him under the judgment appealed from and as they are the most powerful body in the country we do not think it unfair that they should also pay the plaintiff costs of this appeal also.

Order accordingly.

Solicitors: *G.T. Rajan.*

LT. COL. WAN ABDUL MAJID BIN ABDULLAH & ORS. v. CAPTAIN KAMARUL AZMAN BIN JAMALUDDIN

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Raja Azlan Shah F.J.) August 5 and 12, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 66 of 1976]

Administrative Law — Prohibition — Court-Martial — Failure to comply with rules of procedure — Oath to be administered to members of court martial by Judge-Advocate — Oath administered by Religious Teacher in presence of Judge-Advocate — Whether non-compliance with rules of procedure deprives court martial of jurisdiction — Army Act, s. 93 — Malay Regiment Enactment (F.M.S. Cap. 42), s. 44(A)(i).

This was an appeal from the decision of the High Court by which a writ of prohibition was issued prohibiting the court-martial from proceeding with the case against the respondent. It appeared that the oath to the members of the court-martial was administered not by the judge-advocate but by the Tuan Guru in the presence of the judge-advocate. The issue was — does non-compliance with the rules of procedure deprive the court-martial of jurisdiction?

Held: (1) the failure to have the oath administered by the judge-advocate was not fatal if in fact the oath was administered by someone else in his presence;

(2) non-compliance with the rules of procedure did not necessarily deprive the court-martial of jurisdiction.

The following cases were cited in argument: *R.* v. *Secretary of State for War, ex parte Martyn* [1949] K.B. 242, *The King* v. *The Army Council, ex parte Ravenscroft* [1917] 2 K.B. 504, *Peter Chong & Ors.* v. *Col. Adam bin Abubakar & Ors.* [1977] 2 M.L.J. 142, and *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 205.

FEDERAL COURT.

Tan Kam Weng (Senior Federal Counsel) for the appellant.

Datuk Suppiah as *amicus curiae.*

Suffian L.P. (delivering grounds of decision of the Court): We allowed this appeal, for the following reason.

The respondent, an officer of the 3rd Royal Recce Regiment, was charged before a general court-martial on February 16, 1976. At the beginning of the proceedings, the respondent through his counsel objected to the jurisdiction of the court-martial on a ground not relevant to this appeal, and the objection was overruled. The court-martial then continued and on the fourth day after four witnesses had been called, his counsel discharged himself. When the court-martial resumed on March 1, 1976, his new counsel again objected to the jurisdiction of the court-martial, this time on another ground, a ground relevant to this appeal, namely that the oaths taken by members of the court-martial had not been administered by the prescribed person. Again this objection was overruled whereupon the respondent applied — and successfully — to the High Court for a writ of prohibition prohibiting the court-martial from proceeding with the case against him. The court-martial appealed to us and we allowed the appeal.

The issue simply was this — does non-compliance with Rules of Procedure ("R.P.") deprive the general court-martial of jurisdiction? The respondent contended it did, and the learned judge agreed. The court-martial contended that it did not and we agreed.

The relevant statutory provisions are as follows.

Section 93 of the British Army Act was made applicable here by virtue of section 44(A)(i) of the Malay Regiment Enactment. As modified by this latter section, section 93 in its application to this case reads:

"(1) An oath shall be administered to every member of a court-martial and to any person in attendance on a court-martial as judge-advocate,...

(2) ....

(3) An oath required to be administered under this section shall be in the prescribed form and shall be administered at the prescribed time by the prescribed person and in the prescribed manner...."

R.P. 28 reads:

"(1) ...an oath shall be administered to the president and each member of the court....

(2) If there is a judge-advocate [as in this case] the oath shall be administered by *him*...."

Here the members of the court-martial were duly qualified to be members, an oath was administered to every one of them, the oath administered was in the prescribed form, it was administered at the prescribed time and in the prescribed manner, but it is said that it was *not* administered by the prescribed person, i.e., the person prescribed by R.P. 28(2). When the court-martial assembled, the judge-advocate was present, and so was the Tuan Guru, an Islamic religious teacher employed by the armed forces, and the oath was administered not by the judge-advocate but by the Tuan Guru on the direction of the President of the court, and it was argued that this rendered the court-martial improperly constituted and accordingly it had no jurisdiction to try the respondent.

Datuk Suppiah frankly stated that he was unable to find any decided cases on the point, but relied on —

(1) this passage from paragraph 43 of chapter 3 of volume 1 of the *Manual of Military Law* (MML) which, referring to the necessity of administering the oath to members of a court-martial, says:

"If the oath is not administered as required by R.P. to the president, members or judge-advocate, the court is not properly constituted;"

and on —

(2) this passage from page 403 of Part II of MML:

"A court-martial will act without jurisdiction if it is not properly constituted;"

which passages, he said, made it clear that the learned judge was right to make the order of prohibition. He said that as the judge-advocate was present, he should himself have administered the oath, and not the Tuan Guru. We did not agree.

Remembering that soldiers are not lawyers, we should hesitate to insist on a strict compliance with legal technicalities by courts-martial as we are with magistrates and presidents of sessions courts. What is important here is that the oath should be administered to every member of the court-martial, in order to impress on them the solemnity of the occasion and their grave responsibility. That was indeed done. While it is important that wherever possible that should be done by the judge advocate if he is present as here, the failure by him to do so is not fatal if in fact the oath was administered by some one else *in his presence*, though it is hoped that wherever possible it should be done by him personally, to save arguments such as those advanced in this case and obviate delay arising therefrom.

Finally we thank Datuk Suppiah who appeared as *amicus curiae* at our invitation for his assistance.

By consent we made no order as to costs here and in the court below.

Appeal allowed.